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November 26, 2019

The Honorable Gregory H. Woods
United States District Court
Southern District of New York
500 Pearl Street, Room 2260
New York, NY 10007

Re: *Hudson v. National Football League Management Council, et al.*, No. 18-cv-4483
(GHW) – Pre-Motion Conference

Dear Judge Woods:

We represent Defendant National Football League Management Council (“NFLMC”) in the above-referenced action. Pursuant to the Court’s Individual Rules of Practice in Civil Cases Rule 2(C), we write to request a pre-motion conference regarding the NFLMC’s intention to move to dismiss with prejudice the Amended Complaint in this action (Dkt. No. 104). As set forth below, Plaintiff’s Amended Complaint should be dismissed because it fails to state a claim against the NFLMC under the Employee Retirement Income Security Act (“ERISA”).

On September 30, 2019, this Court adopted Magistrate Judge Lehrburger’s Report and Recommendation (Dkt. No. 90 (“R&R”)) dismissing Plaintiff’s original complaint in its entirety. In that complaint, as here, Plaintiff alleged that the NFLMC breached its purported fiduciary duties under ERISA by failing to monitor the Retirement Board, the entity charged with administering the Bert Pell/Pete Rozelle NFL Player Retirement Plan (the “Plan”), an employee benefit plan that provides pension and disability benefits to eligible retired National Football League players. Judge Lehrburger found that the “only power exercised by the” NFLMC with respect to the Plan is “the appointment of three members of the Retirement Board,” and concluded that “the mere ability to appoint or remove trustees to the board of a retirement plan is insufficient to establish broader fiduciary liability for the trustees’ substantive decisions.” R&R, Dkt. No. 90 at 34-35. “At most, appointing parties have only a ‘limited fiduciary obligation [] ... to ensure that the appointees are performing their fiduciary’ functions such as attending meetings and voting.” *Id.* (quoting *Liss v. Smith*, 991 F.Supp. 278, 311 (S.D.N.Y. 1998)).

This Court adopted the R&R and dismissed the original complaint, expressing doubt as to whether a purported duty to monitor could ever extend to substantive decisions by the Retirement Board. Dkt. No. 96 at 6. Ultimately, the Court held that it need not reach a decision

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as to the scope of such duty because even if the duty were as expansive as that argued by Plaintiff:

Plaintiff's complaint says absolutely nothing about the actions of the [NFLMC] ... with regards to their duty to monitor the members of Retirement Board. Plaintiff does not take issue with the actual procedures the [NFLMC] ... used to monitor the board and he does not allege that ... the [NFLMC] ... was aware of any red flags that should have alerted them to potential breaches of fiduciary duties by members of the Retirement Board.

Id. at 7. The Court thus dismissed the claim, but granted Plaintiff leave to file an amended complaint to the extent Plaintiff could plead facts in support of its failure to monitor claim.

On November 15, 2019, Plaintiff filed an Amended Complaint, once again claiming that the NFLMC breached its fiduciary duties under ERISA by failing to monitor the substantive decisions and actions of the Retirement Board. Plaintiff's Amended Complaint fails for the same reasons as his original complaint failed. In particular, notwithstanding this Court's clear directive in its September 30, 2019 Order, Plaintiff's Amended Complaint "says absolutely nothing" about the NFLMC's actions with respect to its alleged duty to monitor the Retirement Board. *Id.* Instead, the Amended Complaint makes unsubstantiated assertions that (1) the existence of other lawsuits regarding administration of the Plan, (2) two news articles, one of which *post-dates* the facts complained of here, and (3) statements by scholars at the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School, somehow triggered a duty at the NFLMC to investigate the substantive decisions and actions of the Retirement Board. None of Plaintiff's limited amendments to the complaint even address much less "take issue with the actual procedures used to monitor the board." Indeed, Plaintiff's allegations once again ignore the fact that to the extent the NFLMC had *any* duty to monitor the Retirement Board, that duty was limited to ensuring that its appointees had "reasonable attendance at [Plan] meetings and [made] reasonable efforts to cast votes on [Plan] issues." *Int'l Bhd. Of Elec. Workers, Local 90 v. Nat'l Elec. Contractors Ass'n*, No. 3:06cv2 (SRU), 2008 WL 918481, at *8 (D. Conn. Mar. 31, 2008).

Plaintiff's Amended Complaint also fails because it continues to assume, contrary to Judge Lehrburger's determination (R&R, Dkt. 90 at 37) and settled authority, that the NFLMC has a duty to monitor substantive decisions of the Retirement Board. In fact, any action by the NFLMC to monitor the substantive decisions made by the Retirement Board would be contrary to clear Supreme Court authority that, in the context of a multi-employer benefit plan, the Labor Management Relations Act prohibits a contributing employer like the NFLMC from directing or



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supervising the determinations made by trustees they appoint. *See N.L.R.B. v. AMAX Coal Co.*, 453 U.S. 322, 330 (1981). The Amended Complaint should be dismissed on this ground as well.

Finally, “[f]or [Plaintiff] to successfully state a claim against the [NFLMC] ... for breach of a purported fiduciary duty to monitor the Retirement Board, he must first adequately plead a breach of fiduciary duty against the Retirement Board itself.” R&R, Dkt. No. 90 at 36 n.11; *see also In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 580 (S.D.N.Y. 2011). Accordingly, the NFLMC will move to dismiss on the separate basis that if Plaintiff’s underlying claims against the Retirement Board are dismissed, a claim against the NFLMC cannot exist.

We appreciate the Court’s attention to this matter and look forward to discussing the matter in greater detail at an upcoming pre-motion conference.

Sincerely,

/s/ Stacey R. Eisenstein

Stacey R. Eisenstein

*Counsel to the National Football League
Management Council*